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NO. 76-5416

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RUBY JONES, PETITIONER

v.

DOUGLAS HILDEBRANT, and the CITY AND COUNTY OF DENVER, a municipal corporation, RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE RESPONDENTS *IN opposition*

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November 30, 1976

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BRIEF OF THE RESPONDENTS

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents submit this Brief in opposition to the heretofore filed Petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of Colorado which held that the state's measure of damages concerning wrongful death governs in an action brought pursuant to 42 U.S.C. §1983 where the §1983 claim is merged into the state's wrongful death claim, when the action on which the claim is based resulted in death. The Respondents submit that in the light of prior statutory and decisional law, the Petitioner has failed to raise a substantial legal issue and certiorari should therefore be denied.

NATURE OF THE CASE

Petitioner raises issues not properly before this Court. Petitioner chose to litigate in the same state court action 1) a cause based on Colorado's Wrongful Death Statute, infra, and 2) a cause based on 42 U.S.C. §1983.

The trial court dismissed the §1983 claim, holding that the §1983 claim merged into the Wrongful Death claim. Petitioner did not appeal the dismissal of the §1983 claim. Petitioner appealed only the damages awarded on the remaining Wrongful Death claim.

However, Petitioner claimed in her damages appeal that her damages were inadequate in "that additional damages should have been permitted under her §1983 claim because that cause of action was not limited by the pecuniary loss rule" (an integral part of Colorado's Wrongful Death Statute). The Colorado Supreme Court concluded that "the interests protected by §1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute. Admittedly, the Colorado Supreme Court went to great lengths to dispel Petitioner's claim to liability and damages under §1983.

Nevertheless, the fact remains that Petitioner pursued only an appeal to the Colorado Supreme Court contesting damages. Here again, Petitioner contests damages awarded by a state court on a state claim. The Petition for Certiorari should be denied in that the issues framed by Petitioner cannot be reviewed under the facts and circumstances before this court.

ISSUE PRESENTED FOR REVIEW

Did the Colorado Supreme Court correctly hold, in view of the absence of any provision in the civil rights statutes relating to survival, in the absence of a well-established federal common law regarding the survivorship issue and of the presence of a provision in the civil rights statutes authorizing resort to the state law regarding damages not inconsistent with the laws of the United States, that the correct measure of damages in an action pursuant to 42 U.S.C. §1983 when the alleged violation resulted in death to the injured person is the state law's measure of damage in actions for wrongful death?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Article VI, Section (2), provides:

   This constitution, and the laws of the United States which shall be made in pursuance thereof #...# shall be the supreme law of the land; and the judges of every state shall be bound thereby; anything in the constitutions or laws of any state notwithstanding.

2. U.S Const., Amend. XIV, provides in part:

   nor shall any state deprive any person of life, liberty, or property without due process of law

3. 42 U.S.C. §1983, states:

   Civil action for deprivation of rights.
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (R.S. Section 1979).

4. 42 U.S.C. §1988, states:

> Proceedings in vindication of civil rights.
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
> (R.S. Section 722).

5. Colo. Rev. Stat. Ann. §§13-21-201 through 13-21-203 (See Exhibit "A).

STATEMENT OF THE CASE

On February 5, 1972, DOUGLAS HILDEBRANT, a uniformed Denver police officer, shot and killed LARRY JONES, a fifteen year-old child. RUBY JONES, the child's mother, brought suit against Officer Hildebrant and the City and County of Denver, alleging wrongful death and a deprivation of civil rights under 42 U.S.C. §1983. Although it was admitted that Respondent Hildebrant intentionally shot the Petitioner's son, the Respondents answered that the police officer was attempting to apprehend a fleeing felon and while acting in self-defense used no more force than he deemed necessary.

At trial, the court dismissed the Petitioner's civil rights claim because it merged with the Petitioner's other claims under the Colorado Wrongful Death Statute which limited the Petitioner's recovery to her "net pecuniary loss" or, in other words, financial loss sustained as a result of the death of her son. Under the Colorado Wrongful Death Statute, net pecuniary loss can include damages to parents for loss of services of children during minority, as well as support and maintenance of parents from children in their declining years. The Petitioner's ability to prove only what she labels as funeral expense damages affirms that the jury found her son's contributions to be negligible. The jury could have awarded $45,000.00 for loss of services and loss of future support of the Petitioner. See C.R.S. 1973, 13-21-201 to 13-21-203. The jury returned a verdict for Petitioner for FIFTEEN HUNDRED DOLLARS ($1,500.00), from which verdict the Petitioner appealed only the damages award therein.

The Supreme Court of the State of Colorado affirmed the ruling of the trial court as to the proper measure of damages where the Section 1983 claim is merged into the State's wrongful death claim. A copy of said opinion being attached hereto and marked as Exhibit "B" is reported in ____ Colo. ____, 550 P.2d 339 (1976).

CERTIORARI SHOULD NOT BE GRANTED

The purpose behind 42 U.S.C. §1983 as recognized in Monroe v. Pape, 365 U.S. 167 (1961) was to provide a federal forum and a federal remedy for one who had been deprived of a Constitutional right by a person acting under color of state law. The federal remedy was provided because state laws prohibiting such deprivations were not being effectively enforced. In this case, Colorado laws provided a remedy for the alleged wrongful act of Respondent, the Petitioner brought suit in a state court seeking said remedy, and the state courts enforced the available remedy. Petitioner now claims she has a Constitutional right to a higher award of damages, notwithstanding the fact that she has already received the only relief envisioned by the Civil Rights Acts.

All the cases decided under the Civil Rights Acts which have involved an alleged deprivation resulting in death have universally referred to state law to determine who has standing to assert the claim and the measure of damages to which that person is entitled. By looking to state law, federal courts have developed a remedy which would otherwise be unavailable since there is no common law right to bring an action for wrongful death and consequently no common law measure of damages for injuries resulting from such death.

Since the issue presented for review is, in reality, not a matter over which there is any dispute, the Petition to this Court for a Writ of Certiorari should be denied.

A R G U M E N T

IT HAS BEEN COMMONLY HELD THAT THE STATE WRONGFUL DEATH REMEDY IS ENGRAFTED IN TOTAL ON 42 U.S.C. §1983 WHERE THE TORT RESULTS IN DEATH.

Petitioner contends that the courts have looked to state law only to determine the question of who has standing to sue under 42 U.S.C. §1983 where the tort results in death. This is clearly an erroneous interpretation of the cases which have dealt with the relationship of state and federal law in this area.

In Brazier v. Cherry, 293 F.2d 401 (C.A. 5th, 1961), cert. denied 368 U.S. 921, a widow brought a §1983 action as Administratrix of decedent's estate, for

damages sustained by decedent during his lifetime, and individually, for the value of the life of the decedent, under the Georgia Survivor and Wrongful Death statutes, respectively. The court stated the issue as follows:

> "Without a doubt Congress had the Constitutional power to spell out a comprehensive right of survival for civil rights claims. The question is therefore one of the everyday variety: has it done so by this means?
> ...
> When we examine (U.S.C.) §1988 in the dual spotlight of the major historical arm of the civil rights legislation, Monroe v. Pape, supra, and the hospitable construction to ameliorate the common law rule, there is ample basis for concluding that this statute fills the gap. Id. at P.406".

The court concluded that Congress had adopted, through 42 U.S.C. §1988, the state law on the general right of "survival" and as to the measure of damages for wrongful death. The Court continued:

> "On our analysis federal law is not suitable, i.e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal statutory framework is, in the words of the statute, "deficient in the provisions necessary to furnish suitable remedies and punish offenses against" that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies. ...And in a very real sense the utilization of local death and survival statutes does not do more than create an effective remedy".

The adoption of the state law on "survival" thus includes the total state remedy and encompasses both the issues of who has standing to bring an action and what damages are recoverable in such action.

The only courts which have discussed the issue of damages in the context of death claims under §1983 have adopted the Brazier v. Cherry view./1 It has been commonly held that a federal court, if it is going to look to the state law on wrongful death at all, must adopt the whole of that law.

> "The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, ...but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose". (The Tungus v. Skovgaard. 358 U.S. 588 at 593 (1958))."

In James v. Murphy, 392 F. Supp. 641 (M.D. Ala., 1975) a widow brought a §1983 action against a jailer, sheriff, and other officials for her husband's death while in jail. The court held that Plaintiff had standing to sue, but dismissed her present complaint for being insufficient under Alabama law.

/1 The following cases have, pursuant to 42 U.S.C. §1988, incorporated the states' wrongful death remedies into actions brought pursuant to 42 U.S.C. §1983 to provide a suitable remedy for deprivation of civil rights: Wolfer v. Thaler, 525 F.2d 977 (5th Cir., 1976); Spence v. Staras, 507 F.2d 554 (7th Cir., 1974); Mattis v. Schnarr, 502 F.2d 588 (8th Cir., 1974); Smith v. Wickline, 396 F.Supp. 555 (W.D. Okla., 1975); Pollard v. United States, 384 F.Supp. 304 (M.D. Ala., 1974); Love v. Davis, 353 F.Supp. 587 (W.D. La., 1973); Salazar v. Dowd, 256 F.Supp. 220 (D. Colo., 1966).

> "The remedies sought by the Plaintiff (in Brazier v. Cherry) were for (a) the damages sustained by the decedent during his lifetime and (b) the damages sustained by his survivors as a result of his death. In fact, the state wherein the cause was tried - Georgia - had wrongful death-type statutes (Georgia Code §3-5-5; §105-1302), which specifically provided for those two types of damages. Thus, by virtue of §1988 these two types of wrongful death remedies were made available to a Plaintiff who sued as the personal representative of a decedent for a violation of that decedent's civil rights under §1983 in Georgia.
>
> Because of the nature of relief available under Alabama wrongful death remedies, a different result may be mandated. Mattie Mae James, in her complaint, asks for compensatory damages, as did the Plaintiff in Brazier v. Cherry, supra - damages sustained by the decedent and damages sustained by his survivors. However, the Wrongful Death Act in Alabama (Code of Alabama, Title 7, §123) does not provide for compensatory damages as do the Wrongful Death Acts in Georgia. The Alabama Wrongful Death Act provides only for punitive damages - not for compensatory or actual damages. ...The right it creates is the right of the personal representative of the decedent to act as agent, by legislative appointment for the effectuation of a legislative policy of the prevention of homicide through the deterrent value of the infliction of punitive damages. Since the Plaintiff, ..., did not claim punitive damages in her complaint, it appears that her complaint is insufficient under §1988, and the Wrongful Death Act of Alabama ...," in accord, Pollard v. United States, 384 F. Supp. 304 (M.D. Ala., 1974).

In Galindo v. Brownell, 255 F. Supp. 930 (S.D. Calif., 1966), a §1983 action was brought by a mother whose minor son was shot by a Los Angeles County deputy sheriff. The court similarly followed Brazier v. Cherry and held that §1988 of the Civil Rights Act gave the benefit of state wrongful death and survival provisions to those protected by the Act.

> "California statutes provide both for survival of actions by a decedent's executor or administrator...and for wrongful death actions by a decedent's heirs or personal representative, ... Plaintiff herein, who, judging from her complaint, seeks only to maintain a wrongful death action for any pecuniary loss sustained by loss of her son's society, comfort, attention, services and companionship, has standing as an heir of the decedent to sue for damages for his wrongful death".

Defendant's Motion to Dismiss was overruled and at the subsequent trial the state measure of damages was to be applied.

Perkins v. Salafia, 338 F. Supp. 1325 (D. Conn., 1972) also involved a suit by a mother for the shooting of her son by state police officers. The court there followed Connecticut law which did not provide a wrongful death remedy for survivors but only allowed the personal representative to assert the action which had accrued to the decedent. Therefore, the Plaintiff mother's action for compensation as to her losses was dismissed.

Finally, Spence v. Staras, 507 F.2d 554 (C.A. 7th, 1974) involved a dual action by a mother for (1) the damages sustained by her son as a result of pain and suffering prior to his death and (2) for pecuniary losses suffered by her as a result of his wrongful death while a patient in a state mental hospital. The first claim was actionable under Illinois' Survival Statute and the second under the Wrongful Death Statute.

> "In the present case, the complaint contains a general prayer for actual damages, as well as an allegation of pecuniary loss to the plaintiff as decedent's next kin. Although the plaintiff may have difficulty, as the district court noted, in proving pecuniary loss due to the death of her non-verbal, mentally ill son, the plaintiff may well be able to prove actual damages resulting from the decedent's pain and suffering prior to his death".

The law is well settled that a §1983 claim may survive the person whose Constitutional rights have been violated despite the fact that the Civil Rights Acts, standing alone, are deficient in this regard and that there is no federal wrongful death statute. It is equally well settled that the law of the forum state is available to fill the void in federal law by supplying a remedy to survivors. The federal courts have unanimously adopted whatever remedy was available in the forum state to vindicate a deprivation of civil rights resulting in death under the mandate of 42 U.S.C. §1988.

> "With regard to any deficiency in the federal law in this regard, §1988 of Title 42 U.S.C. provides that the laws of the forum state shall apply where necessary to provide a suitable remedy for enforcement of the Federal Civil Rights Statutes. It has accordingly been held that, pursuant to...§1988, the wrongful death statute of the forum state would apply in a federal action seeking to enforce rights secured by §1983". Bailey v. Harris, 377 F. Supp. 401 (E.D. Tenn., 1974).

Thus, the Colorado Supreme Court followed the unanimous precedent of federal courts in holding that the Colorado measure of damages for wrongful death would apply in a Civil Rights action based upon a wrongful death.

Similarly, where a §1983 claim has been based upon death, no court has held that a measure of damages different from that existing under the forum state's law would apply. Therein lies the distinction between the cases discussed above and the cases discussed by the Petitioner. Petitioner relies on cases which are inapposite to the issue she raises. Petitioner asserts that there is a federal common law of damages, but none of the cases she cites makes this statement in the context of a wrongful death case. Basista v. Weir, 340 F.2d 74 (C.A. 3rd, 1965) dealt with whether federal or state common law applied in a case where the injured party was seeking punitive damages, but was unable to prove actual damage. The

court held that federal common law would apply. The situation before this court is different. The only issue in cases of this type is whether a state statute will be followed or whether there will be no recovery at all. There is no federal common law allowing recovery for wrongful death; indeed, such a remedy did not exist at common law. The federal courts have interpreted that 42 U.S.C. §1988 encompasses the wrongful death statutes of the various states.

The other cases which the Petitioner discusses as addressing the issue of damages, to-wit: Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Rhoads v. Horvat, 270 F. Supp. 307 (D. Colo., 1967); Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa., 1973) can be similarly distinguished. Sullivan v. Little Hunting Park was a §1982 claim under which Plaintiff alleged that the Defendants interfered with his right to lease his house by refusing to approve his assignment of his membership share in the Park to a black family. Rhoads v. Horvat was an action involving a illegal arrest, (the damages were reduced by the court in that case as being excessive), and Farber v. Rizzo was a civil contempt action against Philadelphia police who violated the terms of a Temporary Restraining Order.

Also implicit in the Petitioner's Brief is the theory that the Petitioner was denied compensation for the loss of her civil rights. The Petitioner's statement of the case, however, indicates that the alleged deprivations are really those of her son. The federal courts have consistently held that one does not have standing to sue for the deprivation of another's rights under 42 U.S.C. §1983 since a cause of action can only be maintained by the "person injured". Hall v. Wooten, 506 F.2d 564 (6th Cir., 1974); Javits v. Stevens, 382 F. Supp. 131 (S.D. N.Y., 1974).

C O N C L U S I O N

The Colorado Supreme Court effectively enforced the only remedy available to the Petitioner in any forum. If she had brought the action in the District Court for the District of Colorado, that court, under §1988, and all of the cases relating to wrongful death decided thereunder, would have been obligated to apply to the Colorado rule of damages as to wrongful death. This is so because the Civil Rights Acts are deficient in not providing a remedy where the alleged Constitutional deprivation results in death and there is no federal measure of damages for wrongful death absent a statute. Consequently, if there is to be any remedy for such deprivations, it must be provided by the law of the forum state. Colorado provided the only remedy which the federal courts have recognized as being available to plaintiffs in actions such as the case at bar. Therefore, in view of the fact that courts have been unanimous in their application of state law to such cases, a Writ of Certiorari should not issue.

Respectfully submitted,

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APPENDIX "A"

PART 2

DAMAGES FOR DEATH BY NEGLIGENCE

13-21-201. Damages for death. (1) When any person dies from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employee while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other conveyance operated for the purpose of carrying either freight or passengers for hire while in charge of the same as a driver, and when any passenger dies from an injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or other conveyance operated for the purpose of carrying either freight or passengers for hire, the corporation or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver is at the time such injury is committed, or who owns any such railroad, locomotive, car, or other conveyance operated for the purpose of carrying either freight or passengers for hire at the time any such injury is received, and resulting from or occasioned by the defect or insufficiency above described shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars and not less than three thousand dollars, which may be sued for and recovered:

(a) By the husband or wife of deceased; or

(b) If there is no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

(c) If the deceased is a minor or unmarried, then by the father or mother who may join in the suit, and each shall have an equal interest in the judgment; or if either of them is dead, then by the survivor.

(2) In suits instituted under this section, it is competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency. If the action under this section is brought by the husband or wife of the deceased, the judgment obtained in said action shall be owned by such persons as are heirs at law of the deceased under the statutes of descent and distribution, and shall be divided among such heirs at law in the same manner as real estate is divided according to said statute of descent and distribution.

Source: G. L. § 877; G. S. § 1030; L. 07, p. 296, § 1; R. S. 08, § 2056; C. L. § 6302; CSA, C. 50, § 1; L. 51, p. 338, § 1; CRS 53, § 41-1-1; C.R.S. 1963, § 41-1-1.

13-21-202. Action notwithstanding death. When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

Source: G. L. § 878; G. S. § 1031; R. S. 08, § 2057; C. L. § 6303; CSA, C. 50, § 2; CRS 53, § 41-1-2; C.R.S. 1963, § 41-1-2.

APPENDIX "A"

13-21-203. Limitation on damages. (1) All damages accruing under section 13-21-202 shall be sued for and recovered by the same parties and in the same manner as provided in section 13-21-201, and in every such action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default; except that if the decedent left neither a widow, widower, nor minor children, nor a dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars. No action shall be brought and no recovery shall be had under both section 13-21-201 and section 13-21-202 and in all cases the plaintiff is required to elect under which section he will proceed.

(2) This section shall apply to a cause of action based on a wrongful act, neglect, or default occurring on or after July 1, 1969. A cause of action based on a wrongful act, neglect, or default occurring prior to July 1, 1969, shall be governed by the law in force and effect at the time of such wrongful act, neglect, or default.

Source: G. L. § 879; G. S. § 1032; R. S. 08, § 2058; C. L. § 6304; CSA, C. 50, § 3; L. 51, p. 339, § 2; CRS 53, § 41-1-3; L. 57, p. 338, § § 1, 2; C.R.S. 1963, § 41-1-3; L. 67, p. 481, § 1; L. 69, pp. 329, 330, § § 1, 3.

2 (a)

APPENDIX "B"

golf facilities mentioned above, the district offers a recreation program with classes in a wide variety of sports as well as art activities. Testimony offered on behalf of the city indicated that, at the time the petition was filed, the only recreation facilities furnished by the city within its corporate limits were several parks with two tennis courts and some playground equipment. While city council did adopt, five months *after* the petition was filed, a master plan for the development of recreation programs, the record reflects that these plans could not be implemented until well after the one year statutory time limit. See section 89-16-3(1)(c).

The city contends that our holding in *City Council of Greenwood Village v. Board of Directors of South Suburban Metropolitan Recreation and Park District*, 181 Colo. 334, 509 P.2d 317 (1973), mandates the granting of its exclusion petition. We disagree. In *Greenwood* we faced a distinctly different situation. We affirmed the trial court's exclusion order in that case after determining that it did not matter whether the municipality contracted with others to provide recreation services or provided those services themselves. In significant contrast to the present case, Greenwood Village sponsored and provided by contract a full array of recreation services, facilities and programs. Unlike the case now before us, the municipality was able to offer services comparable in both quantity and quality to those offered by the recreation district.

We further note that this case does not fall within the purview of the exclusion statute's express legislative purpose: to avoid the overlapping of services and double taxation. 1967 Perm.Supp., C.R.S.1963, 89-16-9.[3]

[3] The trial court's findings and conclusions, moreover, are amply supported by the record, are not arbitrary and capricious, and therefore require affirmation by this Court. 1965 Perm.Supp. C.R.S.1963, 89-16-3(1)(d).

In view of our determination that the petition was properly denied, we need not address the city's contention that the trial court erred in not ordering disposition of the district's assets.

Judgment affirmed.

KELLEY, J., does not participate.

Ruby JONES, Plaintiff-Appellant,
v.
Douglas HILDEBRANT, and the City and County of Denver, a Municipal Corporation, Defendants-Appellees.
No. 26828.

Supreme Court of Colorado, En Banc.
May 24, 1976.
Rehearing Denied June 21, 1976.

Alleging battery, negligence, and a violation of civil rights, mother filed action against police officer and city and county, seeking to recover damages for the wrongful death of her 15-year-old son. The District Court, City & County of Denver, Charles Goldberg, J., awarded plaintiff $1,500, and she appealed solely on the damages issue. The Supreme Court, Hodges, J., held that plaintiff's damages under the wrongful death statute were not unconstitutionally restricted by the net pecuniary loss rule; that the jury's verdict was not inadequate as a matter of law under the evidence presented; that since the state allowed plaintiff to bring suit, she was not deprived of any of her civil rights without due process of law; that while Colorado's

3. Now section 32-1-301, C.R.S.1973.

( )

wrongful death remedy would be engrafted into an action under the Civil Rights Act of 1871 if brought in federal court, since the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the federal civil rights claim should be dismissed; that since the allowable damages were such an integral part of the right to bring a wrongful death remedy, the Colorado law on damages would also apply; that a federal wrongful death remedy does not impliedly exist in the Civil Rights Act of 1871, independent of state wrongful death remedies; and that plaintiff could not sue for the deprivation of her son's rights under the federal Civil Rights Act.

Judgment affirmed.

Pringle, C. J., filed a dissenting opinion in which Groves, J., joined.

1. Death ⇐95(3)

Mother's damages for the wrongful death of her teenage son were not unconstitutionally restricted under the wrongful death statute by the net pecuniary loss rule. C.R.S. '73, 13-21-202; Const. art. 2, § 25; U.S.C.A.Const. Amend. 14.

2. Death ⇐89

The net pecuniary loss rule, relative to recovery under the Colorado wrongful death statute, does not allow for compensation of parental grief. C.R.S. '73, 13-21-202.

3. Death ⇐103(4)

Jury verdict of $1,500 for the wrongful death of plaintiff's 15-year-old son was not inadequate as a matter of law, where, inter alia, evidence of plaintiff's damages was vague and insubstantial. C.R.S. '73, 13-21-202.

4. Constitutional Law ⇐305(2)

Right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐305(2)

Since Colorado allowed mother to bring suit for the wrongful death of her teenage son, she was not deprived of any of her civil rights without due process of law. C.R.S. '73, 13-21-202; 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

6. Death ⇐8
Dismissal and Nonsuit ⇐53(1)

While Colorado's wrongful death remedy would be engrafted into an action under the Civil Rights Act of 1871 if brought in a federal court, since the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the federal civil rights claim should be dismissed; furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, the state's law on damages would also apply. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

7. Civil Rights ⇐12.3

A federal wrongful death remedy does not impliedly exist in the Civil Rights Act of 1871, independent of state wrongful death remedies. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐13.6

One may not sue for the deprivation of another's rights under federal civil rights statute creating a cause of action against persons whose misconduct under color of state law violates the constitutional rights of another; such a cause of action can be maintained only by the "person injured." 42 U.S.C.A. § 1983.

9. Civil Rights ⇐13.6

Mother could not sue in her own right for the deprivation of her deceased son's rights under the Civil Rights Act of 1871, apart from her remedy under state wrongful death cause of action. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

10. Civil Rights ⇐13.6

The interest protected by the Civil Rights Act of 1871, which created a federal cause of action against persons whose misconduct under color of state law violates the constitutional rights of another, are adequately vindicated when actions are brought by the injured parties themselves, or at their death by those designated in the Colorado wrongful death statute. 42 U.S.C.A. § 1983; C.R.S. '73, 13-21-202.

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Walter L. Gerash, Denver, for plaintiff-appellant.

Wesley H. Doan, Joseph A. Davies, Lakewood, for defendants-appellees.

HODGES, Justice.

Plaintiff-appellant Jones recovered, as the result of a jury trial, a $1500 judgment against the defendant-appellees Hildebrant and the City and County of Denver for the wrongful death of her fifteen-year old son. She appeals from this judgment solely on the damage issue. We find no error and therefore affirm the judgment of the trial court.

In her complaint, plaintiff alleged that defendant Hildebrant, while acting in his capacity as a Denver police officer, wrongfully shot and killed her son. The City and County of Denver was joined as a defendant because of its alleged liability as a principal. Her amended complaint stated three claims for relief: (1) battery, (2) negligence, and (3) a violation of civil rights. The first two claims were based on the Colorado wrongful death statute, section 13-21-202, C.R.S.1973. The third claim was premised on 42 U.S.C. § 1983. It will be referred to as the § 1983 claim in this opinion. She prayed for $1,500,000 compensatory damages and $250,000 exemplary damages.

It was admitted that defendant Hildebrant intentionally shot plaintiff's son while acting within the scope of his employment and under color of state law. Liability was denied, however, on the basis that the defendant police officer was attempting to apprehend a fleeing felon or in the alternative was acting in self-defense, and that he was using no more force than was reasonably necessary for these purposes.

Prior to trial, the court dismissed the § 1983 claim, ruling that it merged with plaintiff's other claims under the Colorado wrongful death statute. In addition, the trial court ruled that the wrongful death statute did not permit the recovery of punitive damages, and it also limited plaintiff's recovery to a maximum of $45,000 because she was not a dependent of the deceased. After being instructed that plaintiff could recover only the pecuniary losses she sustained as a result of the death of her son,[1] the jury returned a verdict of $1500 in her favor.

Plaintiff asserts that the judgment should be reversed and a new trial ordered on the issue of damages because (1) her damages under the wrongful death statute were unconstitutionally restricted by the net pecuniary loss rule, (2) that her recovery was inadequate, as a matter of law, and (3) that additional damages should have been permitted under her § 1983 claim because that cause of action was not limited by the pecuniary loss rule.

I.

[1] Plaintiff-appellant assert that this court erred in *Pierce v. Connors*, 29 Colo. 178, 37 P. 721 (1894), when it interpreted the wrongful death statute as permitting the recovery of only compensatory damages for the loss of a decedent's services and support and not permitting the recovery of damages for the survivor's grief or for punitive damages. As a result, she argues that her statutory remedy has been unjustly restricted in violation of her rights

1. In accordance with our ruling in *Herberton v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962), the jury was instructed that net pecuniary loss is the financial loss sustained by the plaintiff as a result of the death of her son. Such losses would include the value of any services that he might have rendered and earnings he might have made while a minor together with any support he might have been expected to provide her after he became an adult, less the expenses she would have incurred in maintaining him.

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under Colo.Const. Art. II, § 25, and the Fourteenth Amendment of the United States Constitution. Alternatively, she argues that "net pecuniary loss" should be defined to include the pecuniary value of her loss of comfort, society and protection.

This court has rejected similar arguments on numerous occasions and has adhered to the net pecuniary loss rule. *See e. g., Kogul v. Sonheim*, 150 Colo. 316, 372 P.2d 731 (1962); *Herbertson v. Russel*, 150 Colo. 110, 371 P.2d 422 (1962); *Denver & R. G. R. R. v. Spencer*, 27 Colo. 313, 61 P. 606 (1900). In response to the argument that the rule unjustly restricts her statutory remedy, we stated in *Herbertson* that

> "[t]he suggestion that this Court should depart from its prior pronouncements defining the measure of damages recoverable under our wrongful death statute would do utter violence to the well-established rule of statutory construction that when a legislature repeatedly re-enacts a statute which has theretofore received a settled judicial construction, there can be no doubt as to the legislative intent, and in such circumstances it must be considered that the particular statute is re-enacted with the understanding that there be adherence by the judiciary to its former construction. . . . ."

[2] Also, in *Kogul*, we specifically held that the net pecuniary loss rule does not allow for the compensation of parental grief.

We therefore adhere to the precedent firmly established in this state and reject the defendant's request to overrule our previous pronouncements on the law in this state on the "net pecuniary loss" rule.

II.

[3] The plaintiff also maintains that the verdict returned by the jury is inadequate, as a matter of law, on the basis of the evidence of her son's habits of industry and disposition to help her. Based on our review of this record, we cannot conclude that the verdict is "grossly and manifestly inadequate" as to "clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations." *See Kogul v. Sonheim, supra.*

The evidence of plaintiff's damages was vague and insubstantial. She testified that her son occasionally helped her with household chores, that he once worked at the East Side Action Center, and that from his earnings there, he once gave her $30 to pay a utility bill. No documentary evidence of funeral expenses was apparently offered to the jury, though some evidence tended to show that these expenses were approximately $1000. Under these circumstances, the trial court refused to set aside the verdict of the jury,[2] and to order a new trial on the damage issue alone. We agree with the trial court's ruling.

III.

Plaintiff-appellant next contends that her § 1983 claim should not have been dismissed because it would have permitted her to recover damages not otherwise available under the state wrongful death action, including punitive damages and damages for mental anguish and loss of society. She advances what are, in reality, four distinct theories to support her position.

Her first theory, although confusingly stated, seems to be that the state wrongful death statute recognizes her claim to a civil right to her son's life, which was denied her without due process of law through his wrongful killing. This argument, in our view, misperceives the meaning of either "liberty" or "property" as protected by the Due Process Clause.

[4,5] The United States Supreme Court in *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), has recently addressed this question in an analogous

2. *Compare Kogul v. Sunkrom, supra*, in which this court upheld an award for $700 for the wrongful death of a three-year old child.

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§ 1983 case where the issue was whether or not a person's right to sue for damages to his reputation under state law created a right to "property" or "liberty" which was unconstitutionally denied him when a state officer allegedly defamed him. The Court held that such a right to sue for damages did not create a right which could be denied solely by the underlying act of defamation. Accordingly, the Court distinguished the right to sue from other property rights, such as, a driver's license:

> "In each of these cases [e. g., the suspension of a driver's license], as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the 'liberty' or 'property' recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws."

The logic behind the Supreme Court's distinction is evident. The right to sue becomes a right protected by the Fourteenth Amendment only when the statutorily guaranteed access to the courts is denied. Therefore, where, as here, the state allows a plaintiff to bring her suit, she is not deprived of any of her civil rights without due process of law.[3]

Secondly, the plaintiff argues that although § 1983 does not expressly create a wrongful death action for a violation of civil rights, 42 U.S.C. § 1988 authorizes the incorporation into federal law of state wrongful death remedies to vindicate violations of civil rights that result in death. She further contends that only that part of the state law granting her this right to sue should be incorporated, but not the state law relating to damages.

We agree with the plaintiff that the federal courts have commonly ruled that § 1988 permits the incorporation of the states' non-abatement statutes[4] and wrongful death statutes[5] into § 1983 actions in

3. *Accord, James v. Murphy*, 392 F.Supp. 641 (E.D.Ala.1975), which held that an administratrix's rights under the Alabama wrongful death statute was not a property right protected by the Fourteenth Amendment.

4. The following courts have held that § 1983 actions which accrued during the lifetime of the decedent do not abate at his death but survive to his estate according to state law: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Troutman v. Johnson City*, 392 F.Supp. 556 (E.D.Tenn.1975); *Javits v. Stevens*, 382 F.Supp. 131 (S.D.N.Y.1974). *See also* Annot., 58 A.L.R.2d 1153.

5. The following cases have incorporated the states' wrongful death remedies into § 1983 actions so that a personal representative can bring actions in behalf of certain designated beneficiaries or so that the beneficiaries themselves may bring an action in their own right: *Waller v. Thaler*, 525 F.2d 977 (5th Cir. 1976); *Spence v. Staras, supra*, n. 4; *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Brazier v. Cherry, supra*, n. 4; *Smith v. Wickline*, 390 F.Supp. 555 (W.D.Okla.1975); *Jones v. Murphy, supra*, n. 3; *Pollard v. United States*, 384 F.Supp. 394 (M.D.Ala. 1974); *Bailey v. Harris*, 377 F.Supp. 401 (E.D.Tenn.1974); *Smith v. Jones*, 370 F. Supp. 203 (1973), *sum. aff'd.*, 497 F.2d 924;

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order to effectually implement the policies of that legislation.[8] For example, the leading case, *Brazier v. Cherry*, *supra*, n. 4, allowed a surviving widow to recover damages sustained by the decedent during his lifetime and damages sustained by his survivors as a result of his wrongful death by incorporating the Georgia survival statutes. The court reasoned that the civil rights legislation was designed to protect citizens not only from violence which would cripple but also from violence that would kill. However, because no express provision was established for the survival of § 1983 claims where death occurs, the court held that Congress must have intended to adopt as federal law the forum state's law on survival by means of § 1988. The Supreme Court also concluded that 42 U.S.C. § 1986, which provides for a limited survival action for suits brought under § 1985 which relates to conspiracies to deprive others of their civil rights, should not be interpreted as demonstrating a Congressional intent to exclude survival remedies from other portions of the Act. Rather, it held that, to be consistent with the manifest Congressional intent to provide a civil rights remedy even when death occurs, the omission of express survival remedies in § 1983 was indicative of Congressional intent to incorporate state remedies.

[6] We therefore conclude that Colorado's wrongful death remedy would be engrafted into a § 1983 action if brought in a federal court. However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the § 1983 claim should be dismissed.[7]

Furthermore, because the allowable damages are such an integral part of the right to bring a wrongful death remedy, we believe the state's law on damages should also apply.[8] Though not directly ruling on this issue, federal courts have implicitly adopted the state limitations on wrongful death damages. In *Smith v. Wickline*, *supra*, n. 5, the Oklahoma wrongful death remedy was adopted even though it did not allow the recovery of punitive damages. In *Galindo v. Brownell*, *supra*, n. 5, the California wrongful death statute was used even though it only allowed the recovery of pecuniary losses by a parent.[9] Finally, in *Jones v. Murphy*,

Love v. Davis, 353 F.Supp. 587 (W.D.La. 1973); *Galindo v. Brownell*, 255 F.Supp. 930 (E.D.Cal.1966).

6. In *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), the Court held that § 1988 was not intended to be a basis for an independent cause of action, but it was designed only to permit the incorporation of state remedies to effectuate causes of action that arise in other parts of the civil rights act. It then cited *Brazier* with apparent approval as an example of the proper incorporation of state law under § 1988. Consistently, the Court in *Moragne v. United States Marine Lines*, *infra*, n. 10, characterized a wrongful death action as essentially remedial because it does not impose an additional duty of care on the tort-feasor.

7. The suit under the state claim was, in fact, a broader remedy because it allowed a recovery against the City and County of Denver, which because of its status as a municipality, would not probably be liable under § 1983. *See Moor v. County of Alameda*, supra, n. 6, and *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

8. Our ruling thus accords with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent. For instance, in *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), the Court observed that the "policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

9. *See also Spence v. Staras*, *supra*, n. 4, where the Illinois wrongful death remedy, which permitted the recovery of only pecuniary losses, was incorporated into a § 1983 suit. The court there allowed the recovery of punitive damages but its reasons for doing so are unclear. Most likely, the court allowed such damages in connection with another claim based on the damages sustained by the decedent while he was alive, damages which the court noted were recoverable under Illinois law.

10. For instance, in *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), the Court held that an implied action for wrongful death based on unseaworthiness is maintainable under federal maritime law by the decedent's dependents. In *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court began to spell out some of the para-

supra, n. 3, only punitive damages were allowed because the Alabama law did not allow compensatory or actual damages.

[7] Plaintiff Jones' third theory is that a federal wrongful death remedy impliedly exists in § 1983, independent of state wrongful death remedies. Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas[10] of the law, we do not believe that such a remedy exists with § 1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts.[11]

The plaintiff's fourth and final theory for obtaining a separate recovery under her § 1983 claim is that she was deprived of her own constitutional rights. While not forthrightly articulating just what those rights are, she alleges in her complaint that her rights were violated because her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated.

[8,9] These deprivations, however, are really those of her son. The federal courts have consistently held that one may not sue for the deprivation of another's rights under § 1983, and that a cause of action can be maintained only by the "person injured." *See Hall v. Wooten*, *supra*, n. 4, and *Jones v. Stevens*, *supra*, n. 4, and cases cited therein. She therefore cannot sue in her own right for the deprivation of her son's rights apart from her remedy under the wrongful death cause of action.

[10] Furthermore, the state did not directly attempt to restrict her own personal decisions relating to procreation, contraception, and child-rearing which are involved in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Although the death of a family member represents a loss to her, we, nonetheless, are of the opinion that § 1983 was not designed to compensate for these collateral losses resulting from injuries to others. Otherwise, damages would infinitely extend not only to parents and children, but to siblings and perhaps even to a "family" of close friends. The interests protected by § 1983 are adequately vindicated when actions are brought by the injured parties themselves, or at their death, by those designated in our wrongful death statute.

The judgment is affirmed.

PRINGLE, C. J., and GROVES, J., dissent.

KELLEY, J., does not participate.

PRINGLE, Chief Justice (dissenting):

I respectfully dissent.

I do not believe that Colorado's judicial limitation of net pecuniary loss as a measure of the remedy when it ruled that the wrongful death remedy would allow the recovery of pecuniary losses, funeral expenses and loss of society.

11. Were we to rule otherwise, this court would have to fashion a remedy for a federal right bottomed on a federal statute that itself has no provisions concerning the class of beneficiaries, the proper parties to bring suits, and the type of damages. For example, it is still unclear in a *Moragne* wrongful death action whether such an action is limited to dependents only. *See, e. g., Hamilton v. Canal Barge Co.*, 395 F.Supp. 978 (E.D.La. 1975).

6(b)

6(b)

7(b)

ure of damages for wrongful death applies to actions founded upon 42 U.S.C. § 1983 (1970).

I am authorized to say that Mr. Justice GROVES joins in this dissent.

R. M., Petitioner,

v.

The DISTRICT COURT IN AND FOR the TENTH JUDICIAL DISTRICT, State of Colorado, and the Honorable Richard Robb, one of the District Judges in and for the Tenth Judicial District, State of Colorado, Respondents.

No. 27111.

Supreme Court of Colorado,
En Banc.
June 1, 1976.

Juvenile instituted original proceeding for purpose of challenging jurisdiction of respondent district court in a juvenile delinquency proceeding. The Supreme Court, Kelley, J., held that statute mandated that a delinquency petition, which had been filed while juvenile was committed to state hospital under a previous court order, be dismissed ab initio without prejudice, that district court may take evidence regarding a child's mental condition as early as the filing of delinquency petition relating to such child and that doctor's report was not sufficient, as a matter of law, to sustain order denying juvenile's motions for appointment of psychiatrist to examine juvenile and for suspension of adjudicatory hearing on delinquency petition.

Rule made absolute as to issue relating to dismissal of delinquency petition, and discharged as to remaining issues.

1. Statutes ⇐235

Provisions of children's code should be liberally construed to accomplish the purpose and to effectuate intent of legislature. C.R.S. '73, 19-1-102(2).

2. Infants ⇐16.5

Purpose of statute pertaining to procedure to be followed in delinquency proceeding if it appears that child may be mentally ill or developmentally disabled is to protect mentally ill or mentally deficient juvenile from having to respond to delinquency petitions in an adversary setting and to provide an affirmative avenue of relief through medical treatment for such juveniles as an alternative to the ordinary juvenile delinquency proceeding. C.R.S. '73, 19-3-107.

3. Infants ⇐16.4

Statute, which provides in effect that the court shall dismiss the original delinquency petition "when a child is committed to a state hospital or state home and training school," mandated that a delinquency petition, which had been filed while juvenile was committed to state hospital under a previous court order, be dismissed ab initio without prejudice to a filing of a new petition at time at which juvenile was no longer committed. C.R.S. '73, 19-3-107(3), 27-9-105.

4. Infants ⇐16.9

District court may take evidence regarding a child's mental condition as early as the filing of delinquency petition relating to such child. C.R.S. '73, 19-3-107(1), 27-9-105.

5. Infants ⇐16.9

Doctor's report, which was prepared while juvenile was committed under short-term involuntary hospitalization order and which did not specifically offer a diagnosis of juvenile's mental condition and was, at most, equivocal as to juvenile's state of mind, was not sufficient as a matter of law to sustain order denying juvenile's motion for appointment of psychiatrist to examine juvenile and for suspension of adjudicatory hearing on delinquency petition. C.R.S. '73, 19-3-107(1-4), (1)(a).

8b